United Nations A/62/567

General Assembly

Distr.: General
6 December 2007

Original: English

Sixty-second session
Agenda item 70 (c)
Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives

Letter dated 4 December 2007 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

Upon instructions from my Government, I have the honour to convey herein Israel's response (see annex) to the report dated 17 August 2007, submitted by Mr. John Dugard, Special Rapporteur to the Human Rights Council (A/62/275).

I should be grateful if you would circulate the present letter and its annex as a document of the General Assembly, under agenda item 70 (c).

(*Signed*) Dan **Gillerman**
Ambassador
Permanent Representative

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Annex to the letter dated 4 December 2007 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

Response of Israel to the report dated 17 August 2007 submitted by Mr. John Dugard, Special Rapporteur to the Human Rights Council (A/62/275)

General

The latest report of the Special Rapporteur follows its predecessors in letter and tone in the approach it takes to the region. Its findings, like those of the reports that came before it, are predetermined and, indeed, large portions of the text have been borrowed from its predecessors. Moreover, the current report was prepared without the Special Rapporteur visiting our region and, thus, many of his conclusions are based on hearsay and unsubstantiated second-hand reports.

Regrettably, the report insists on viewing a complex situation through the simplest of prisms, one in which one side has only rights and the other has only obligations; one in which one side has a monopoly over victimhood, while the other is demonized and censured. Indeed, while the Special Rapporteur calls upon the Quartet to adopt a "fair and even-handed approach to the respective positions of Israel and the Palestinians", the approach adopted by the Special Rapporteur in crafting this report is anything but "fair" or "even-handed". In the narrow perspective of the Rapporteur, the terrorism and violence emerging from Palestinian areas simply do not exist, or at most are of little consequence, and as a result, any measure undertaken by Israel to protect its civilians can only be illegitimate or disproportionate.

In order to advance this one-sided perspective, the report presents a collage of misrepresentations and misstatements of both fact and law. Many of these are restatements of allegations made in prior reports – yet even when these have been demonstrably shown to be false, either in Israel's responses to previous reports, or by retractions made by those cited as authorities, they continue to be asserted without reservation. For example, the Rapporteur cites at length a report published in 2006 by Peace Now regarding land ownership in the West Bank, but fails to note that the organization issued a corrected report due to the fact that the original report, upon which the Special Rapporteur's findings are based, was rife with factual errors.

Beyond the factual and legal errors in the report, this latest report brings into clear focus the political and ideological agenda of the current Rapporteur, which, troublingly, places him at odds with established norms of human rights and international humanitarian law and, in effect, legitimizes some of the gravest violations of international law. It is a cause for serious concern that that a UN-appointed official with responsibilities in the sphere of human rights publicly advocates positions that so fundamentally diverge from universally-accepted humanitarian principles and which, in effect, condone some of the most serious abuses of human rights.

Legitimization of terrorism

In his prior reports, the current Rapporteur had demonstrated a reluctance to condemn terrorism, suggesting that there is currently no legal basis for censuring suicide terrorism (which at most violates an "emerging norm of international law"), and hinting at a sneaking admiration for those firing kassam missiles on civilians as "demonstrating daring and prowess". However, the current report, the Rapporteur breaks new ground in legitimizing acts of terrorism against civilians.

In clear opposition to the repeated UN resolutions that declare that terrorism is unjustifiable no matter what the cause it purports to advance, the Rapporteur advances the position that terrorism is a "relative concept", particularly in the context of occupation. It is difficult to square such a relativistic approach with a condemnation of terrorism in all circumstances. As the Rapporteur himself wrote in 1977: "If the most brutal acts of terrorism directed at innocent civilian targets are permitted when committed by members of a "liberation movement", human rights will suffer a severe setback at the hand

of international law"[1]. And yet, in his current incarnation, the Rapporteur consistently demonstrates a deliberate blindness to the perpetration and glorification of acts of terrorism by groups on the Palestinian side.

The report goes on to compare Palestinian terrorists with resistance fighters throughout history, warning that "today such resistance fighters are seen as heroes and patriots. This is the inevitable consequence of resistance of occupation." It is unclear what is "heroic" about the Hamas terrorist organization and the dictates of its official charter, which, in no uncertain terms, calls for the complete annihilation of the State of Israel. The Special Rapporteur, rather than condemn such violent ambitions, adopts an approach which legitimizes organizations like Hamas while blaming the victim of Hamas' reign of terror – the State of Israel. Moreover, the Rapporteur refuses to recognize any distinction between Hamas and its likes and moderate Palestinians opposed to the use of terrorism and committed to a peaceful resolution of our conflict.

In his disregard for the question of the legitimacy of an avowed terrorist organization, the Rapporteur places himself in staunch opposition to the international community and, in particular, the Quartet comprising the UN, the EU, the United States and Russia, which have established clear conditions for granting legitimacy to any Palestinian leadership. In the eyes of the Rapporteur, however, by holding fast to such standards, the international community is pursuing, "...a divisive policy of preferring one faction over the other". Such assessments not only far exceed his mandate, but also undermine any claims that the report is objective in its findings.

In a similar vein, the Rapporteur determines that the prisoners held by Israel are "political prisoners" suggesting that these are individuals being detained for their political or ideological views, and not their active involvement in acts of violence and terrorism. Indeed, if these individuals are merely political prisoners, one is left to wonder at whose hand thousands of Israeli civilians have been murdered and wounded in the years of Palestinian terror.

In this context, it is interesting to note that, "... from a doctrinal point of view, the international terrorist does **not** fall within the category of political offender. When a person commits an act which threatens the stability of other states or undermines the international order, he ceases to be a political offender and becomes a criminal under international law, like the pirate or hijacker"[2]. [*Emphasis added*]. This clear statement of international law is taken from an article authored by the Rapporteur himself in 1973.

Proportionality

As he has done in several past reports, the Special Rapporteur labels Israeli actions in self-defense as disproportionate, but as he has done in the past, offers no indication as to what types of actions would be a "proportionate" response to acts the Special Rapporteur himself describes as "war crimes", such as the daily, indiscriminate firing of rockets on communities within Israel, as well as attacks on Israeli forces patrolling the Israeli side of the Perimeter fence. It should be noted that many of these violent terrorist attacks are perpetrated by Palestinians from within civilian population centers, including schools. The Rapporteur also does not indicate what the "proportionate" response would be to the ongoing and intensive military buildup currently being undertaken by the Hamas faction ruling Gaza with a view to future confrontations and the ultimate destruction of the State of Israel. Every state has the right under international law to self-defense; Israel cannot stand idly by as its kindergartens and shopping centers are bombarded.

Taxes and Banking Regulations

The Special Rapporteur condemns both Israel's policy of withholding taxes as well as the United States imposition of banking restrictions as part of its fight against terrorism. It should be noted that such policies conform with and implement the dictates of a number of U.N. Security Council resolutions that address the issue of the funding of global terrorist

[1] John Dugard, "International Terrorism and the Just War", (vol.12), Stanford Journal of International Studies, (1977), p. 21 at p. 32.

[2] John Dugard, "Towards a Definition of International Terrorism", American Society of International Law, Volume 67 (1973), p. 94, at p. 98.

networks. However, despite the numerous calls made by the U.N. to curb the financing of terrorism, the Rapporteur chooses to ignore the danger of transferring funds directly into the hands of terrorists and the need for accountability in this age of global terrorism.

Omissions, Misrepresentations, and Distortion of Facts

As noted above, the Special Rapporteur's report is rife with erroneous and misleading information. The Special Rapporteur has eschewed a meaningful and earnest investigation as to the facts, which are readily available and at his disposal. Below is a mere sampling of erroneous and misleading "facts" and figures presented in the report:

- The Special Rapporteur states, incorrectly that "Israel's obligations as occupying Power have not diminished," and that "Israel remains an occupying Power in respect of Gaza" (*Summary; para. 10*). Such statements fail to acknowledge the fact that since implementation of its Disengagement Plan, Israel has ended its military occupation of the Gaza Strip by pulling out all of its forces and redeploying them behind the international frontier, as well as dismantling all of the Israeli settlements that were situated there. Any military incursions in Gaza since Disengagement have been for the sole purpose of Israel's legitimate right under international law to defend its borders and citizens as a response to the unceasing barrage of Hamas rockets on Israeli civilian targets despite Israeli withdrawal from Gaza, and **not** part of an effort to occupy or "...control through military incursions, rocket attacks and sonic booms" (*para. 10(b)*).

- Contrary to the Special Rapporteur's assertions, the official Israeli government policy vis-à-vis the Gaza Strip is designed to ensure that no humanitarian crisis occurs. As it is entirely legitimate for a state to limit its economic relations with hostile powers, movement of persons and goods through sovereign Israeli territory to and from the Gaza Strip has been limited since the violent takeover by Hamas. However, Israel continues to allow such movement of persons and goods through its sovereign territory as required for humanitarian purposes. This policy remains intact despite Hamas' reign of terrorism and the constant barrage of rockets into Israel, as well as the real threat of attacks at the crossing points into Israel and usage of such passages to infiltrate into Israel's sovereign territory and carry out attacks against both Israeli civilian and military targets.

  Thus, the Special Rapporteur's claim that Israel has asserted that it is, "...no longer bound by international humanitarian law in its actions vis-à-vis Gaza residents" (para. 9) is a complete misstatement. It is unclear how the Special Rapporteur arrived at such an assertion, as Israel has never made such a policy statement. Indeed, since June 2007, over 10,000 trucks have passed into Gaza via the Kerem Shalom, Sufa, Karni, and Nahal Oz terminals carrying over 231,000 tons of humanitarian supplies, including sugar, oil, rice, legumes, milk, meat, fresh produce, animal feed, fuel and gas[3]. The crossings into Gaza, contrary to the information presented in the report, are generally opened daily during normal business hours when no clear and concrete threat of terror exists. In the event that a crossing must be closed for security reasons, Israel makes all efforts to find an alternative solution for the delivery of humanitarian supplies into Gaza.

- Contrary to the Special Rapporteur's claim in paragraph 14 of this report that Israel failed to investigate the incident described therein, it should be noted that the Israeli Defense Forces did, indeed, undertake an investigation shortly after the incident, which was carried out in accordance with the mandatory procedures. Following such investigation and an analysis of the evidence, it was decided that no criminal proceeding should be initiated against the parties involved.

- As he did in his previous report, the Special Rapporteur erroneously links the kidnapping of Corporal Shalit with the various closings of the Rafah crossing and insinuates that such closings are reprisal actions by Israel (*para. 18*). First, it should be noted that Israel no longer has effective control over the Rafah crossing. Moreover, the Rafah crossing has been opened several times in the last months in order to allow the passage of persons for humanitarian purposes; this, despite the real danger of allowing terrorists to pass through the crossing.

[3] The above figures are correct as of 29 October 2007, as reported by the Israeli Ministry of Defense.

- The Special Rapporteur erroneously states that there are "10,000 Palestinian **political** prisoners...." [*emphasis added*] (*Summary; para. 43*). The use of the term "political prisoner" gives the incorrect impression that such persons are being held for their political beliefs, when in truth such prisoners are being held for their active participation or complicity in crimes of violence and terrorism.

- In the report, the Special Rapporteur writes that, "The right of the Palestinian people to self-determination has been denied and obstructed for nearly 60 years by Israel" (*para. 5*). Such an accusation is quite plainly factually incorrect and reflects an ignorance of the history of our region. Clearly, the Special Rapporteur is unaware that the 1947 Partition Plan was embraced by the Jewish residents while rejected by the Arab residents of what was then Palestine, and that the Palestinian national movement did not emerge until decades later. Finally, for more than a decade, Israel had been involved in a difficult and sincere effort to reach a settlement that would achieve just that – Palestinian self-determination.

- The Special Rapporteur, in his discussion of IDF Operations "Summer Rains" and "Autumn Clouds" presents various factual errors and distortions. For example, the Special Rapporteur grossly exaggerates the number of military incursions carried out by Israeli forces during Operations "Summer Rains" and "Autumn Clouds." Moreover, his assertion that during those military operations the Israeli Defense Forces targeted civilian targets such as schools and hospitals is simply incorrect. Furthermore, his assertion that "82 Palestinians, at least half of whom were civilians (including 21 children), were killed by the IDF" during Operation Autumn Clouds, is also erroneous. During the course of that operation, a total of 30 persons were killed, including several Hamas and other Palestinian militants. 6 of those killed were civilians (including 4 minors).

- The Special Rapporteur repeatedly blames "Palestinian militants" (*para. 16; 53*) for the rocket and other attacks on Israeli civilians, rather than the Hamas regime. This misleading wording gives the false impression that such acts of violence and gross human rights violations against Israeli civilians are perpetrated by lone, fringe groups in Palestinian society when really the opposite is true; such attacks represent the official policy of the Hamas regime that currently controls Gaza. Israel calls upon the Special Rapporteur to hold Hamas accountable for its terrorist policies and actions.

- In paragraph 18 of his report, the Special Rapporteur erroneously states that Corporal Shalit was benignly "arrested", when in reality, Corporal Gilad Shalit was violently abducted and is still being held captive and denied even the most basic humanitarian rights under international law, including the right to visitation by a Red Cross representative.

- The Special Rapporteur falsely claims that the European Border Assistance Mission was prevented from Israel from carrying out its task. It is unclear upon what source the Rapporteur relied upon in making such a claim. Moreover, he incorrectly states that such organization is "...responsible for operating Rafah" (para. 18). The Mission's mandate clearly indicates that it does **not** serve in such capacity and, rather, is present at the border as a third party acting to help build confidence between Israel and the Palestinian Authority and serve as a liaison.

- The Special Rapporteur erroneously states that "Israel has abandoned its claim that the wall [*sic*] is a security measure...and now concedes that one of the purposes of the wall is to include settlements within Israel" (para. 27). Israel has never made a statement to that effect and is unclear as to the source of such statement or how the Rapporteur would arrive at such a conclusion. The Government of Israel has repeated, on numerous occasions, that the construction of the security fence is a temporary, non-violent, protective measure based solely on security considerations and upon the principle of self-defense and is aimed at preventing easy entrance of terrorists into Israel. It should be noted in this context that the Israeli High Court of Justice reviews the path of the security fence and in all instances insures that the route of the fence serves security interests only.

- In addition, in his discussion of Israel's construction of its security fence, the Rapporteur presents various unsubstantiated and incorrect figures. For example, the Special Rapporteur cites that "an estimated 60,000 West Bank Palestinians...will reside in the closed zone between the wall [*sic*] and the Green Line." The figure that the

Rapporteur presents is grossly inflated and has been sited in past reports despite Israel's rebuttal of such figures. Indeed, to date only 7,000 persons reside in the "closed zone", and 1,000 more will be included with the completion of the construction of the fence.

- In this context, it should be further noted that, contrary to the Special Rapporteur's assertions, all residents of the closed zones have access to a checkpoint that is opened 24 hours a day. In addition, it should be clarified that gates along the security fence are opened at regular hours and notice of such hours of operation, as well as the contact information of the relevant authorities that will facilitate the opening of such gates at other hours, is posted clearly on the gates.

- The Special Rapporteur's portrayal of Palestinian farmers' access to agricultural lands is also misleading. The Special Rapporteur draws no distinction between gates that lead to lands that are cultivated seasonally (which are opened on a seasonal basis) and gates that lead to crops cultivated year-round, which are opened throughout the year.

- In addition, contrary to the Special Rapporteur's assertion that it is difficult for Palestinians to obtain permits to access their agricultural lands, it should be noted that over 75% of all permit requests by Palestinians have been approved by Israeli authorities.

- Also, contrary to the Special Rapporteur's assertions, construction of the security fence in the Maale Adumim area will not alter current arrangements which allow Israeli citizens – including Arab residents of East Jerusalem holding Israeli identification certificates – access to Jerusalem through 12 different entry portals. Both prior to the construction of the security fence and currently, Palestinians wishing to enter Jerusalem must seek an entrance permit and may enter through special access areas designed to facilitate security checks. It should be emphasized that the construction of the security fence has no bearing on these arrangements.

- The Special Rapporteur incorrectly states that the security fence around the Gush Etzion bloc will "sever the last route between Bethlehem and Jerusalem and isolate the majority of Bethlehem's agricultural hinterland." This statement is simply incorrect. Such a route exists today and will continue to exist as construction of the fence in that area is completed. There is no Israeli plan to impede or block the route. Furthermore, access to agricultural lands in this area will not be blocked by the fence as it will not be declared a "closed zone" requiring an entry permit. Rather, the entire area will be left open, with access subject to security checks.

- As for the construction of the security fence in the Jerusalem area, the Special Rapporteur incorrectly states that the fence separates Palestinian territory from other Palestinian territory, when, in truth it does not change the legal status of the area or the residents on either side of the fence. Hence, it is dubious as to how exactly Israel plans to achieve the "Judaization" of Jerusalem with the construction of the fence.

- In his discussion of settlements and settlers, as noted above, the Special Rapporteur quotes freely from a 2006 Peace Now report, failing to note that the organization issued a corrected report after an admission that said the original report was rife with errors. It should be noted that in a subsequent report issued by that organization, the statistical information presented was corrected to indicate that private Palestinian land ownership in the West Bank was significantly lower than initially presented in the original report (and than erroneously presented in this report by the Special Rapporteur).

- The claims set forth by the Special Rapporteur in his discussion of Palestinian access to the Jordan Valley area are also in error. It should be noted that, contrary to the Rapporteur's assertions, Israel does not require Palestinian pedestrians in the Jordan Valley to carry permits. All that is required to enter the area is a routine security examination.

- In his discussion of checkpoints and roadblocks, the Special Rapporteur states that a permit is required to travel from one area in the West Bank to another. This is simply incorrect – no permit whatsoever is required to travel from one city to another in the West Bank.

- The Special Rapporteur claims that there has been a marked "deterioration" in the West Bank in terms of the state of human rights in the past years. However, statistics provided by the World Bank and other organizations point to a trend in the opposite direction which points to overall growth and development. For example, the Special Rapporteur ignores the Palestinian Authority's 3% increase in trade with Israel as compared to 2005 (12% as compared to 2004); the Authority's 5.2% increase in the volume of exports since 2004; the drop in unemployment (17.3% in 2007 as compared to 24.6% in 2004), with an overall trend of the reduction of joblessness since 2002; real GDP figures overall have improved since 2003; and nominal GDI per capita statistics also point to a consistent rise since 2002. The Special Rapporteur also fails to make note of various Israeli initiatives to improve the economic situation in the West Bank, including the development of plans to create an industrial zone.

Conclusion

Previous reports of the Special Rapporteur have suggested that he has little interest in contributing either to an improvement of human rights protection in our region or to a resolution of our conflict. Neither of these goals can be achieved without some appreciation of the complexity of the situation, and of the balance of rights and responsibilities, which is so lacking in both the current and past reports.

Israel has emphasized for over a decade that there can be no value in a report created pursuant to a one-sided and inherently imbalanced mandate that ignores principles of equality and impartiality. A mandate that prejudges key issues stands in marked contrast to the current wave of reforms in the United Nations and, in particular, to those supposedly being undertaken in the Human Rights Council. Israel and other states have long noted the fundamental imbalance in the mandate of the Special Rapporteur, which calls upon him to examine alleged human rights violations by Israel only, and, thus, invites him to ignore those committed on the Palestinian side.

Despite the fact that the Special Rapporteur in his August 2005 report noted that he felt compelled to address Palestinian violations as well, his current report stands largely silent on this subject. It should be noted that a recent report by the Palestine Center for Human Rights[4], courageously highlights the grave human rights and international humanitarian law breaches of Palestinians against each other, and the escalating state of lawlessness in the territories controlled by the Hamas-led government. It documents detailed incidents of extra-judicial and willful killings; abductions; torture and executions (including those of injured persons at the end of combat); attacks on hospitals, medical and civil defense crews; attacks on residential buildings; the looting of property; and attacks against the media. In contrast, the Special Rapporteur has chosen to maintain a deafening silence regarding these gross abuses of human rights.

The current report, however, reflects an approach which is potentially even more damaging. The narrow and politically motivated prism it adopts not only fails to make any contribution to positive movements in our region, but it seeks to undermine core humanitarian principles. Such a report, which undermines the concept of self defense and which ignores universally accepted standards prohibiting the use of violence against civilians can only be regarded as a major step backwards in the protection human rights, not just in our region, but throughout the world.

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[4] "Black Pages in the Absence of Justice" on the bloody fighting in the Gaza Strip in June 2007.